

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
July 25, 2006 Session

**STATE OF TENNESSEE v. ROBERT OKEY JOHNSON**

**Direct Appeal from the Criminal Court for Sullivan County  
No. S49, 571; 49, 572; S50, 350 Phyllis H. Miller, Judge**

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**No. E2005-02676-CCA-R3-CD - Filed November 27, 2006**

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Pursuant to plea agreements with the state, the defendant, Robert Okey Johnson, pled guilty to one count of aggravated assault and two counts of failure to appear. He received probation for his convictions for failure to appear. For his aggravated assault conviction, he agreed to a three-year sentence with the manner of service to be determined by the criminal court. After a sentencing hearing, the court ordered the defendant to serve his sentence in confinement. On appeal, the defendant challenges the court's sentence of confinement. Following our review of the parties' briefs and applicable law, we affirm the court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Richard A. Spivey, Kingsport, Tennessee, for the appellant, Robert Okey Johnson.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Robert H. Montgomery, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

Following entry of the defendant's guilty pleas on November 3, 2005, a sentencing hearing was held to determine the manner of service of the defendant's three-year sentence. At the hearing, the state presented the following incriminating evidence:

[W]ith Case No. S50, 350, the failure to appear charge, the defendant had two cases pending in the Criminal Court for Sullivan County, S49, 571, a Class C Felony charge of aggravated assault and S49, 572, a Class E Felony charge of failure to

appear. He had been ordered by the Court to reappear on March 4th, 2005. He had been released on bond and on March 4th, 2005 he failed to appear in the Criminal Court for Sullivan County as ordered by the Court.

With regard to the aggravated assault charge, S49, 571, the proof would be that . . . on April 14th, 2004[,] Officer Tom Saylor with the Sullivan County Sheriff's Office . . . came in contact with Crystal Pickle Johnson . . . who in front of the officer had bruising around her eyes. It appeared that she had been involved in a fight. In talking to her she indicated to the officer that three days earlier on April 11th she had been at the family home with the defendant, her husband, Robert Okey Johnson, and at that time she had been cooking some food to prepare for Easter and to deliver to some family members. Because she had been drinking [the defendant] refused to let her go. Ms. Johnson left anyway. When she came back she stated that the defendant took the batteries out of a cordless phone so that she couldn't make any calls to 911 or others and that at that point in time he did hit her in the face causing both the eyes to be black and also bruising her lip.

It was determined at that time that there was also . . . an order of General Sessions Court for Sullivan County in Bristol in Case No. S175644 in which he had been sentenced and in that sentencing he had been ordered from having no violent contact with Christine Pickle Johnson. . . .

The defendant testified that prior to being incarcerated in the local jail for failure to appear, he was employed by Superior Industries for four months as "line loader." Prior to working for Superior Industries, he had worked various jobs involving equipment repairs and construction. He recalled that prior to working these different jobs, he got his start as a racehorse jockey and had worked in the horse racing business for almost twenty-seven years. The defendant admitted he failed to appear in court on two occasions but stated it would not happen again.

The defendant testified that he and his wife were married one year ago. Previously, they had dated and lived together for nearly four years. The defendant described his marriage as tumultuous. He noted that he and his wife would both get into verbal and physical altercations and that his wife had bailed him out of jail several times. He stated that his wife had a drinking problem and was diagnosed with bipolar disorder. The defendant asserted that he still loved his wife and they had both been to counseling. He submitted that he still had a job if released. He further submitted that he had no prior felony convictions.

On cross-examination, the defendant admitted that he did not complete a court-ordered, probation program, called Abuse Alternatives. However, he asserted that he attended the program for five of the six months. Upon being questioned by the court, the defendant acknowledged that he was convicted of a domestic assault on February 20, 2002, which was "reset for one year to be dismissed." The defendant explained that his wife fell but accused him of pushing her down. The defendant also acknowledged that he pled guilty to theft of a gun on June 20, 2002. However, he

asserted that the incident was based on a misunderstanding where his friend owned a gun and thought he stole it. The defendant stated that the gun was later returned to his friend. The defendant further acknowledged that he pled guilty to two theft offenses. As the defendant recalled, one of the theft charges involved a boat trailer which a friend accused him of stealing, and the other charge involved the shoplifting of a \$3.00 wrench in Florida, which he claimed was not in his possession. He admitted that he failed to appear before the court on the shoplifting charge and forfeited his bail.

Christine Ann Johnson, the defendant's wife, testified that she loved her husband and desired to stay married to him. She stated that her past alcohol abuse and financial difficulties caused problems in her marriage with the defendant. She recalled that she had been drinking at the time the defendant committed the assault against her. She said she did not want the defendant to go to jail and that she and the defendant were both in counseling at the time of the defendant's arrest. She asserted that she and the defendant would continue counseling if it would help matters. On cross-examination, she explained that the defendant was arrested for the assault after she had called her brother in California and told him about it. Her brother then reported the incident to the police.

At the conclusion of the sentencing hearing, the criminal court stated the following:

[The defendant is] presumed to be a favorable candidate for alternative sentencing just because he pled to a C felony as a Range I standard offender. Now, that can be overcome. That can be overcome if the Court finds that he has a criminal history demonstrating a failure of past efforts at rehabilitation or a criminal history demonstrating a clear disregard for the laws of society. He doesn't have a lengthy, lengthy criminal history. He does have a criminal history. Evidently he steals and he has a violent criminal history.

The court then noted that it had considered the testimony of the defendant's wife, the argument of the defendant's counsel, the nature and circumstances of the offense, and all the information in the presentence report. The court stated that the defendant did not have a drinking problem and did not abuse drugs. The court considered all the statutory enhancement and mitigating factors. The court found that the defendant had a previous history of criminal convictions, had failed to comply with conditions of sentences involving release into the community, and had abused a position of private trust. *See* Tenn. Code Ann. § 40-35-114(1), (8), and (14). The court found no applicable mitigating factors. The court also found that the defendant had a poor social history and demonstrated a lack of remorse by not accepting responsibility for his crimes. The court then denied alternative sentencing and ordered the defendant to serve his sentence in confinement. Thereafter, the defendant filed a timely notice of appeal to this court.

## **ANALYSIS**

The defendant appeals the criminal court's denial of alternative sentencing and order of confinement. Specifically, the defendant argues that the court erred in denying alternative sentencing

when it improperly applied enhancement factor (14) and failed to properly balance and weigh the applicable enhancement and mitigating factors.

In making its sentencing determinations, a trial court must consider (1) the evidence received at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the arguments of counsel relative to sentencing alternatives; (5) the nature and characteristics of the criminal conduct involved; (6) any applicable mitigating or enhancement factors; (7) any statements made by the defendant in his or her own behalf; and (8) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210; *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). The weight accorded enhancement and mitigating factors is within the trial court's discretion so long as the record supports its findings and its findings comply with sentencing principles. *State v. Kelly*, 34 S.W.3d 471, 479 (Tenn. Crim. App. 2000).

Appellate review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the defendant has the burden of showing that the sentence imposed by the trial court is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

A defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, or has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Also, the presumption in favor of alternative sentencing may be rebutted by facts contained in the presentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source, provided it is made a part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

Pursuant to Tennessee Code Annotated section 40-35-103, a trial court may determine if incarceration rather than alternative sentencing is appropriate if the evidence shows that:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). As part of its determination, the court may also consider the defendant's potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). Additionally, the defendant's lack of truthfulness or candor is an appropriate consideration as it relates to the defendant's potential for rehabilitation. *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). A court may also apply the relevant mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. *See* Tenn. Code Ann. § 40-35-210(b)(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

Upon review of the record, we initially determine that the criminal court erroneously applied enhancement factor (14) when denying the defendant's request for alternative sentencing. In applying this enhancement factor, the court stated the following: "[H]e abused a position of private trust. She's his wife, she loved him, she loves him now, she loved him that day. I guess if you're married to somebody like that you trust them not to beat you up. . . . She had him living in the house with her like they were married . . . ." Generally, when the victim, as in this case, is an adult, he or she is held to have reasonable judgment and independence, and the mere fact that the defendant and adult victim live together is insufficient for application of the private trust enhancement factor. *See State v. Gutierrez*, 5 S.W.3d 641, 645 (Tenn. 1999). Proper application of the private trust factor requires that the court examine "the nature of the relationship," and whether that relationship "promoted confidence, reliability, or faith." *Id.* at 646 (quoting *State v. Kissinger*, 922 S.W.2d 482, 488 (Tenn. 1996)). "A relationship which promotes confidence, reliability, or faith, usually includes a degree of vulnerability." *Id.* It is the exploitation of this vulnerability to achieve the criminal offense which is deemed more blameworthy and thus justifies application of the enhancement factor. *Id.* Accordingly, this enhancement factor applies only where there is evidence that the nature of the relationship between the perpetrator and the victim caused the victim to be particularly vulnerable. *Id.* If such a relationship is shown, then it must be proven that the perpetrator abused that relationship in committing the crime. *Id.* In the instant case, the record reflects that the defendant assaulted his wife after she ignored his instructions to stay home because she had been drinking alcohol. While the defendant's actions are certainly deplorable, the record does not show that the defendant occupied a position of private trust with respect to his wife, and that he purposefully exploited his wife's particular vulnerability in order to assault her. Accordingly, the application of this enhancement factor was in error.

Notwithstanding the court's erroneous consideration of enhancement factor (14), the record supports the court's denial of alternative sentencing. In the instant case, the record reflects that the defendant had a history of criminal convictions and behavior. The defendant had a domestic assault conviction and three theft convictions. The defendant was charged with shoplifting in Florida and failure to appear. He also had been charged with domestic assault but the case had been reset for one

year then dismissed. Of significance, the record also reflects that efforts less restrictive than confinement had failed. The defendant received probation for his theft convictions. Thereafter, the defendant had two probation violation charges filed against him in Sevier County. He pled guilty to one of the charges and his probation was reinstated. The warrant for a subsequent probation violation was returned as not served. Furthermore, he received probation for his domestic assault conviction. A probation violation warrant was filed alleging that the defendant had failed to attend domestic abuse counseling, pay court costs, and report to his probation supervisor. Although the warrant was never served, the defendant admitted that he violated his probation by failing to complete his domestic abuse counseling. The record further supports the court's findings that the defendant lacked remorse. Thus, we discern no error in the court's denial of alternative sentencing.

With regard to the defendant's contention that the court failed to properly balance and weigh the applicable enhancement and mitigating factors, we reiterate that the weight given to enhancement and mitigating factors is a matter entrusted to the sound discretion of the trial court. The record reflects that the court reviewed all the relevant enhancement and mitigating factors, and, as previously noted, the court's findings were sufficiently supported by the record. Therefore, the defendant is not entitled to relief on this issue.

### **CONCLUSION**

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

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J.C. McLIN, JUDGE